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IN THE

Supreme Court of the United States

October Term, 1970
No. 492

NORMAN C. GALLAGHER and RUTH I. GALLAGHER, husband and wife,
Petitioners,

v.

CHARLES S. WILBOUR and HARRIET G. WILBOUR, his wife; and CHESTER L. GREEN and RUBY GREEN, his wife; on behalf of themselves and all other residents and property owners of the Town of Chelan, State of Washington, and all other members of the general public similarly situated,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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INTRODUCTION

This reply brief is in response to the briefs in opposition to the petition filed by both respondents and the Attorney General of the State of Washington as *amicus curiae*. It should be noted at this point that for some reason the Attorney General has failed to advise the court that the Attorney General had also appeared as *amicus curiae* before the Washington Supreme Court *in support* of petitioners' position.

STATEMENT COMMON TO BOTH BRIEFS IN OPPOSITION

Both respondents and *amicus curiae* agree that, if the decision on which a writ of certiorari is being sought represents a substantial departure from Washington law, it constitutes an unconstitutional taking in violation of Fourteenth Amendment to the Constitution of the United States. Respondents have made this concession by necessary implication from their arguments and *amicus curiae* has expressly conceded this point (Am. Cur. Br., p. 7).

Beyond this common concession, however, respondents and *amicus curiae* take contradictory approaches in atting to justify the decision below.

REPLY TO RESPONDENTS

Respondents assert that the decision was a matter of first impression but based upon an extension of the Washington decisions governing naturally fluctuating waters (Resp. Br., pp. 4, 7). Respondents, however, cite only a few decisions from other jurisdictions—jurisdictions in which the law has developed in a manner inconsistent with the historic development in Washington. Respondents totally ignore the long established (since at least 1895) line of Washington decisions contrary to the majority decision in this case (Pet. pp. 7-9).

Respondents' ultimate position is that the decision is supported by an interpretation of the deed restrictions in petitioners' chain of title (Resp. Br., pp. 6-7). This position is: (1) based on asserted facts which are unsupported and outside the record; and (2) in conflict with the majority opinion which refused to consider that question. As

pointed out in the dissenting opinion, had the case been decided on that issue, it would have required judgment in favor of petitioners (77 W.D.2d at 322; Pet., pp. 4, 14).

REPLY TO *AMICUS CURIAE*

Amicus curiae asserts that the decision is consistent with the established law in the state. In support of this assertion, a total of three cases (1901, 1904 and 1915) are cited.

The first case cited and quoted at length, *New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 64 Pac. 735 (1901), involved riparian rights to the waters of a *non-navigable* stream. The statement quoted is part of a statement of the position of one of the parties and is at best *dictum* since the court rejected the issue as irrelevant to the case before it. The court, however, went on to state that "navigational" rights were, in any event, strictly limited to a right of commercial use for commerce—rejecting the law of other states such as Minnesota[1] which recognized broad rights.

The second case cited, *Dawson v. McMillan*, 34 Wash. 269, 75 Pac. 807 (1904), merely enjoined the total obstruction of the only available channel of commercial navigation. The Washington Supreme Court itself has previously so limited the decision in that case—rejecting attempts to use it in the manner *amicus curiae* now asserts. *Strand v. State*, 16 Wn.2d 107, 132 P.2d 1011 (1943). (Petition, pp. 7-9).

The third case cited, *Hill v. Newell*, 86 Wash. 227, 149 Pac. 951 (1915), involved only a question of the title to

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1. Respondents and *amicus curiae* attempt to rely on Minnesota decisions to support the decision.

a river bed after the river had been straightened. In a very misleading manner, *amicus curiae* sets forth only a portion of the language from the California decisions quoted with approval in *Hill v. Newell* (*amicus curiae* Br. p. 10). Immediately following the general statement set forth by *amicus curiae*, the Washington Supreme Court in *Hill v. Newell* quoted with approval further, closely-following language from *People v. California Fish Co.*, 166 Cal. 576, 584, 138 Pac. 79, 82 (1913) that all submerged land outside of channels of commercial navigation could be transferred to private ownership and ". . . thereby destroying the public easement in such portion of the lands and giving them over to the grantee, free of public control and use." (86 Wash. at 231).

Amicus curiae relies upon a gerrymandering of quotations and seeks to ignore those decisions dealing directly with the subject.

CONCLUSION

A review of this case will not (as asserted in the brief of *amicus curiae*, p. 10) require the court to review the law of any other state, as each state has developed its own law. The issue here is whether the Washington Supreme Court by this decision made a sudden change in the law of the State of Washington. It is clear that it has. In that court's own words, it has created a "*new* type of privately owned shorelands of little value" (77 W.D.2d 307 at 318, footnote 13, underscoring supplied).

Respectfully submitted,

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